RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-299

In the
Supreme Court of the United States

NATIONAL ASSOCIATION OF MANUFACTURERS,
Petitioner,
v.
DEPARTMENT OF DEFENSE, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

RESPONDENTS' BRIEF IN SUPPORT OF CERTIORARI ON BEHALF OF AGROWSTAR, LLC; AMERICAN EXPLORATION & MINING ASSOCIATION; CALIFORNIA CATTLEMEN'S ASSOCIATION; COALITION OF ARIZONA/NEW MEXICO COUNTIES FOR STABLE ECONOMIC GROWTH; DUARTE NURSERY, INC.; GEORGIA AGRIBUSINESS COUNCIL, INC.; GREATER ATLANTA HOMEBUILDERS ASSOCIATION, INC.; HAWKES COMPANY, INC.; LPF PROPERTIES, LLC; NEW MEXICO CATTLE GROWERS ASSOCIATION; NEW MEXICO FEDERAL LANDS COUNCIL; NEW MEXICO WOOL GROWERS, INC.; OREGON CATTLEMEN'S ASSOCIATION; PIERCE INVESTMENT COMPANY; R. W. GRIFFIN FEED, SEED & FERTILIZER, INC.; SOUTHEASTERN LEGAL FOUNDATION, INC.; AND WASHINGTON CATTLEMEN'S ASSOCIATION

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QUESTION PRESENTED

On June 29, 2015, the Environmental Protection Agency and U.S. Army Corps of Engineers issued a joint rule redefining "waters of the United States" subject to the Clean Water Act. 80 Fed. Reg. 37054 (Clean Water Rule).

Under § 1369(b)(1) of the Clean Water Act, certain actions of the Environmental Protection Agency are subject to exclusive review in the courts of appeals. In determining whether promulgation of the Clean Water Rule was such an action, the Sixth Circuit considered subsections (E) and (F) that involve:

> (E) approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title,
>
> (F) issuing or denying any permit under section 1342 of this title.

One judge on the Sixth Circuit panel concluded the Rule satisfied both subsections (E) and (F) of the jurisdictional standard. One judge concluded the Rule only satisfied subsection (F). And one judge concluded neither subsection was satisfied and § 1369(b)(1) did not apply.

Question: Does a rule defining federal jurisdiction under the Clean Water Act, but which does not entail issuing or denying a permit, vest the courts of appeals with exclusive power to review the rule under § 1369(b)(1)(F)?

LIST OF ALL PARTIES

The Judicial Panel on Multidistrict Litigation consolidated the petitions for review in the Sixth Circuit (Consolidation Order, Dkt. No. 3, MCP No. 135 (JPML July 28, 2015)), the Sixth Circuit then permitted petitioner here, the National Association of Manufacturers, to intervene as a respondent. Order, No. 15-3751 cons. (Sept. 16, 2015).

The federal agency respondents are the U.S. Environmental Protection Agency; Regina McCarthy, in her official capacity as EPA administrator; the U.S. Army Corps of Engineers; Lieutenant General Todd T. Semonite, in his official capacity as the Corps' Chief of Engineers and Commanding General; Jo-Ellen Darcy, in her official capacity as Assistant Secretary of the Army; and Eric Fanning, in his official capacity as Secretary of the Army.

State respondents and intervenor-respondents are the States of New York, Connecticut, Hawaii, Massachusetts, Oregon, Vermont, Washington, and the District of Columbia.

Over 100 other parties filed 22 petitions for review below, and intervened in other petitions, and many of those petitioners moved to dismiss their own and other petitions for review for want of jurisdiction. These petitioners below, respondents here, are as follows:

No. 15-3751: Murray Energy Corporation.

No. 15-3799: States of Ohio, Michigan, and Tennessee.

No. 15-3817: National Wildlife Federation.

No. 15-3820: Natural Resources Defense Council, Inc.

No. 15-3822: State of Oklahoma.

No. 15-3823: Chamber of Commerce of the United States; National Federation of Independent Business; State Chamber of Oklahoma; Tulsa Regional Chamber; and Portland Cement Association.

No. 15-3831: States of North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, New Mexico Environment Department, and New Mexico State Engineer.

No. 15-3837: Waterkeeper Alliance; Center for Biological Diversity; Center for Food Safety; Humboldt Baykeeper; Russian Riverkeeper; Monterey Coastkeeper; Upper Missouri Waterkeeper, Inc.; Snake River Waterkeeper, Inc.; Turtle Island Restoration Network, Inc.

No. 15-3839: Puget SoundKeeper; Sierra Club.

No. 15-3850: American FarmBureau Federation; American Forest & Paper Association; American Petroleum Institute; American Road and Transportation Builders Association; Greater Houston Builders Association; Leading Builders of America; Matagorda County Farm Bureau; National Alliance of Forest Owners; National Association of Home Builders; National Association of Realtors; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Pork Producers Council; National Stone, Sand, and Gravel Association; Public Lands Council; Texas Farm Bureau; and U.S. Poultry & Egg Association.

No. 15-3853: States of Texas, Louisiana, and Mississippi; Texas Department of Agriculture; Texas Commission on Environmental Quality; Texas Department of Transportation; Texas General Land Office; Railroad Commission of Texas; Texas Water Development Board.

No. 15-3858: Utility Water Act Group.

No. 15-3885: Southeastern Legal Foundation, Inc.; Georgia Agribusiness Council, Inc.; Greater Atlanta Homebuilders Association, Inc.; AGrowStar, LLC; and R.W. Griffin Feed, Seed & Fertilizer, Inc.

No. 15-3887: States of Georgia, West Virginia, Alabama, Florida, Indiana, and Kansas; Commonwealth of Kentucky; North Carolina Department of Environment and Natural Resources; States of South Carolina, Utah, and Wisconsin.

No. 15-3948: One Hundred Miles; South Carolina Coastal Conservation League.

No. 15-4159: Southeast Stormwater Association, Inc.; Florida Stormwater Association, Inc.; Florida Rural Water Association, Inc.; and Florida League of Cities, Inc.

No. 15-4162: Michigan Farm Bureau.

No. 15-4188: Washington Cattlemen's Association; California Cattlemen's Association; Oregon Cattlemen's Association; New Mexico Cattle Growers Association; New Mexico Wool Growers, Inc.; New Mexico Federal Lands Council; Coalition of Arizona/New Mexico Counties for Stable Economic Growth; Duarte Nursery, Inc.; Pierce Investment Company; LPF Properties, LLC; Hawkes Company, Inc.

No. 15-4211: Association of American Railroads; Port Terminal Railroad Association.

No. 15-4234: Texas Alliance for Responsible Growth, Environment and Transportation.

No. 15-4305: American Exploration & Mining Association.

No. 15-4404: Arizona Mining Association; Arizona Farm Bureau; Association of Commerce and Industry; New Mexico Mining Association; Arizona Chamber of Commerce & Industry; Arizona Rock Products Association; and New Mexico Farm & Livestock Bureau.

CORPORATE DISCLOSURE STATEMENT

Respondents are non-profit advocacy groups or privately held companies that have no parent corporations and do not issue stock.

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OPINIONS BELOW

The decision of the court of appeals is reported at 817 F.3d 261 (6th Cir. 2016) (*See* Pet. App. 1a-47a). The court of appeals' denial of the petition for rehearing en banc was not reported and is reproduced at Pet. App. 51a-52a.

JURISDICTION

The separate judgment of the court of appeals denying all motions to dismiss the petitions for review for lack of subject matter jurisdiction was entered on February 22, 2016. Pet. App. 48a-50a. The court of appeals' order denying rehearing en banc was entered April 21, 2016. On July 21, 2016, Justice Kagan extended the time to file the Petition to September 2, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Although the parties filing this brief are aligned with the petitioner in the court below, they appear in this case as respondents. *See* Petition for Certiorari at iv and v (Nos. 15-3885, 15-4188, and 15-4305). Respondents support the Petition for Certiorari.

The Petition raises a question of great national importance about whether Congress intended a definitional rule delineating the scope of the Clean Water Act (Act) to be reviewed exclusively in the court of appeals, or, as the plain text of the Act states, in the federal district courts. This is important because cases challenging the Clean Water Rule (Rule) are pending in numerous district courts and in the Sixth and the Tenth Circuit Courts of Appeals and the Rule itself extends federal regulatory authority over local land and water use further than any rule in this nation's history. It affects millions of landowners across the country.

Review of the Sixth Circuit's decision on jurisdiction is warranted for four reasons. First, if this Court does not review the decision now, it may never do so, leaving the issue unresolved. Second, delay in reviewing the decision may result in substantial and unnecessary cost and delay. Third, the decision below is inconsistent with this Court's treatment of subject matter jurisdiction under 33 U.S.C. § 1369(b)(1). And fourth, resolution of this issue is needed to effectuate the clear intent of Congress.

ARGUMENT

I

THIS COURT SHOULD GRANT REVIEW BECAUSE IT MAY BE THE ONLY TIME IN THIS CASE THE COURT IS PRESENTED WITH THE JURISDICTIONAL QUESTION

If this Court does not grant interlocutory review of the Sixth Circuit jurisdictional determination, it is not only possible, but likely, this Court will not have the opportunity to resolve the issue in this case at a later time because a decision on the merits may never reach this Court.

The most likely outcome in the Sixth Circuit on the merits is a win for petitioners. This is evident from the Sixth Circuit's issuance of a preliminary injunction staying enforcement of the Clean Water Rule nationwide. *See In re EPA*, 803 F.3d 804 (6th Cir. 2015).

The Sixth Circuit concluded that "petitioners have demonstrated a substantial possibility of success on the merits of their claims." *Id.* at 807. The court was skeptical of the bright-line distance limitations associated with terms like "adjacent waters" and "significant nexus" adopted in the Clean Water Rule. *Id.* The court determined the distance limitations for defining jurisdictional waters, such as those within 4,000 feet of a "tributary," were likely inconsistent with this Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), even under Justice Kennedy's interpretation of the Act. *In re EPA*, 803 F.3d at 807. The court also found "the rulemaking process by which the distance limitations were adopted is facially suspect." *Id.* This followed from the fact that the

distance limitations included in the final Rule did not appear in the proposed Rule and were not a "logical outgrowth" thereof, as required to satisfy the notice-and-comment requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553. *In re EPA*, 803 F.3d at 807-08.

> Although the record compiled by respondent agencies is extensive, respondents have failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the rule were among the range of alternatives being considered.

Id. at 807.

"Nor have respondents cited specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose." *Id.*

The Sixth Circuit was also concerned about the "sheer breadth of the ripple effects caused by the Rule's definitional changes" on the nation as a whole. *Id.* at 808.

> What is of greater concern to us, in balancing the harms, is the burden—potentially visited nationwide on governmental bodies, state and federal, as well as private parties—and the impact on the public in general, implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters.

Id.

The Sixth Circuit is right to be concerned. The Clean Water Rule categorically extends federal

jurisdiction to all tributaries of a traditional navigable water, no matter how small, remote, indirect, or intermittent. 80 Fed. Reg. 37054, 37074 (June 29, 2015). This impinges on state power, exceeds the limits of constitutional authority, and directly conflicts with *Rapanos* in which this Court rejected categorical regulation of all tributaries. The inclusion of certain waters within 4,000 feet of any tributary or within the 100 year floodplain, *id.*, also conflicts with this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), (*SWANCC*), that expressly prohibited federal regulation of "isolated waterbodies." The Clean Water Rule federalizes virtually all waters in the United States and much of the land.

This concern extends beyond the Sixth Circuit to the District of North Dakota that stayed the Rule as applied to 13 states: North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico. *See North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015). The Sixth Circuit made note of this stay in its own ruling. *See In re EPA*, 803 F.3d at 808 n4.

Among other things, the District Court of North Dakota concluded the Clean Water Rule's definition of covered tributaries is inconsistent with the *Rapanos* decision and the "States have established a fair chance of success on the merits of their claim that the Rule violates the congressional grant of authority to the EPA." *North Dakota*, 127 F. Supp. 3d at 1056. The court also found the Rule likely invalid because the inclusion of all tributaries and the distance limitation of 4,000 feet appears "arbitrary and capricious." *Id.* at

1057. And, like the Sixth Circuit, the North Dakota court concluded the final rule potentially violated the APA because it was substantively different from the proposed rule:

> When the Agencies published the final rule, they materially altered the Rule by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule.

Id. at 1058.

If the state, industry, and municipal petitioners are successful in challenging the Clean Water Rule in the Sixth Circuit, as appears likely from these preliminary injunctions, it would be strange for petitioners to seek review of that favorable decision in this Court, even to resolve the jurisdictional question presented here. In fact, it would be contrary to their interest to do so. The government also has good reason to not petition this Court for review if it loses the case below because: (1) the Rule undoubtedly violates the APA and conflicts with this Court's opinions in *Rapanos* and *SWANCC*; (2) the government supports jurisdiction in the courts of appeals and opposes review of the jurisdictional question here; and (3) it is possible the new administration may wish to recall or revise the Rule without seeking review in this Court, which would start another round of uncertain litigation.

This uncertainty warrants immediate review of the interlocutory petition. The question presented is of great national importance as it goes to the intent of Congress with respect to one of the broadest and most

intrusive statutes in the history of the nation. The challenged Clean Water Rule affects tens of millions of public and private landowners across the Country who remain in the dark about where to bring a facial challenge to federal rules defining the scope of the Clean Water Act. Moreover, as the Petition demonstrates, there is a conflict among the lower courts as to how to interpret § 1369(b)(1) of the Act. *See* Petition at 20-24. This situation is as unnecessary as it is intolerable. This Court should grant the Petition and resolve the jurisdictional question sooner rather than later.

II

THIS COURT SHOULD GRANT REVIEW BECAUSE IMMEDIATE RESOLUTION OF THE JURISDICTIONAL QUESTION IS THE BEST USE OF PARTY AND COURT RESOURCES

If this Court waits to decide the jurisdictional question until after the Sixth Circuit rules on the merits of the challenge, the result could be "a perfect storm." A decision by this Court that the Sixth Circuit did not have subject matter jurisdiction under § 1369(b)(1) of the Clean Water Act would require a complete redo with relitigation at the district court level. All the cost and delay to that point would be for naught. This is bad public policy and a waste of resources for all concerned that benefits no one. But, more to the point, this possibility of unnecessary cost and delay is avoided if this Court addresses the question now.

Soon after the Clean Water Rule was issued, the Rule was challenged in nearly a dozen suits filed across the country in nine district courts. These challenges included a majority of the states and scores of municipal and industry parties. The challenges were brought in district court because a plain reading of 33 U.S.C. § 1369(b)(1) required it. The Clean Water Act is unequivocal: a challenge to agency action is authorized directly in a court of appeals only when the agency action involves "approving or promulgating any effluent limitation or other limitation" or "the issuing or denying of a permit." § 1369(b)(1)(E) & (F). The Clean Water Rule involves no such action. It is a definitional rulemaking only, establishing the limits of federal authority under the Clean Water Act. It defines the scope of the Act without regard for any limitation or permit.

As a protective measure only, the parties that originally filed suits in the district courts, including respondents here, petitioned for review in their respective courts of appeals. These were consolidated in the Sixth Circuit, which determined it had exclusive subject matter jurisdiction under § 1369(b)(1) to review these challenges. However, a ruling by this Court that the Sixth Circuit misread § 1369(b)(1) is highly likely.

Each of the three judges on the Sixth Circuit panel acknowledged that a plain reading of the Act does not support review of the Clean Water Rule in the court of appeals. *See In re Department of Defense*, 817 F.3d 261 (6th Cir. 2016). In the lead opinion, Judge McKeague concluded the Clean Water Rule fell under § 1369(b)(1)(E) and (F) of the Act, giving exclusive jurisdiction to the courts of appeals. *Id.* at 263-64. However, that was not based on a textual reading of

the statutory language, but on what the judge called a "practical, functional" reading of the Act. *Id.* at 273. Contrary to Judge McKeague, Judge Griffin eschewed a "functional" reading of the Act preferring a more "textualist" approach. According to Judge Griffin, "it is illogical and unreasonable to read the text of either subsection (E) or (F) as creating jurisdiction in the courts of appeals for these issues. Nevertheless, because [*National Cotton Council of America v. U.S. EPA*, 553 F.3d 927 (6th Cir. 2009)] held otherwise with respect to subsection (F)," he concurred in the judgment only. *Id.* at 275. Finally, Judge Keith concluded in his dissent that "under a plain meaning of the statute, neither subsection (E) nor subsection (F) of 33 U.S.C. § 1369(b)(1) confers original jurisdiction on the appellate courts" and that *National Cotton* was inapposite. *Id.* at 283. Therefore, Judge Keith would have found jurisdiction in the district courts. This fractured ruling suggests the issue of jurisdiction is uncertain even in the Sixth Circuit and warrants review and reversal by this Court.

In deference to the Sixth Circuit's uncertain and doubtful ruling on jurisdiction, proceedings challenging the Clean Water Rule were dismissed in the Northern District of W. Virginia (1:15-cv-110), the Southern District of Ohio (2:15-cv-2467), and the Northern District of Oklahoma (4:15-cv-381). Proceedings are stayed, pending further development on the jurisdictional issue in the courts of appeals or in this Court, in the District of North Dakota (3:15-cv-59), the Southern District of Georgia (2:15-cv-79), the Northern District of Georgia (1:15-cv-2488), and the D.C. District Court (1:16-cv-01279). Motions to dismiss are pending in the Southern District of Texas (3:15-cv-162 and 3:15-cv-165) and the District of Minnesota

(0:15-cv-3058). Of the eleven suits brought in district court, seven still await a final determination on jurisdiction; a determination only this Court can give.

That the Sixth Circuit did not and could not provide a consistent interpretation of § 1369(b)(1), and that the majority of the district courts are still awaiting conclusive direction from this Court, demonstrate the need for immediate review of this Petition.

It is also noteworthy that the Tenth Circuit has scheduled a hearing on the jurisdictional question for mid-November (lead case No. 16-5038), and briefs on the merits in the Sixth Circuit have not yet been filed. Merits briefing will take months; it certainly will not be completed before next year. If this Court grants the Petition, the Sixth Circuit would likely hold any briefing in abeyance until this Court resolves the jurisdictional question. This would be the best possible outcome to avoid unnecessary delay and cost. And, if this Court decides, as it should, that subject matter jurisdiction lies within the district courts, the district courts are already poised to proceed.

III

THIS COURT SHOULD GRANT REVIEW BECAUSE THE JURISDICTIONAL DECISION BELOW IS INCONSISTENT WITH THIS COURT'S TREATMENT OF § 1369(b)(1)

This Court's treatment of § 1369(b)(1)(E) and (F) in *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), and *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980), conflicts with the Sixth Circuit's interpretation.

In *E.I. du Pont*, the EPA issued general effluent limitations for certain categories of point source discharges. Because these effluent limitations were issued by rule rather than on a permit-by-permit basis, the petitioners argued the rule was subject to challenge in the district court rather than in the court of appeals. However, this Court held the EPA was authorized to promulgate effluent limitations by rule, as well as on a case-by-case basis. This Court concluded, therefore, that review in the court of appeals was compelled by § 1369(b)(1)(E) as an agency action "approving or promulgating any effluent limitation."

Judge McKeague relied on this case below for the notion that this Court advocates a "practical interpretation" of § 1369(b)(1) rather than a "textual" or "plain reading" of the Act. But this Court did not need to apply a "practical interpretation" of the Act in that case contrary to the obvious meaning of the Act, as the Sixth Circuit did in this case. The issuance of a rule specifying effluent limitations for various categories of point source discharges falls squarely within the plain meaning of the statute. A rule that sets generally-applicable effluent standards is, by definition, a promulgation of an effluent limitation under subsection (E). This is quite different from the Clean Water Rule which defines the scope of the Act and nothing more.

This Court's analysis of § 1369(b)(1) in *Crown Simpson* was similar. In *Crown Simpson*, the EPA denied a variance and disapproved effluent limitations that were included in a specific permit issued by the State of California to certain pulp-mills that discharged into the Pacific Ocean near Eureka, California. The Ninth Circuit held it did not have jurisdiction to review

the EPA action because it did not involve a direct permit denial under § 1369(b)(1)(F). This Court disagreed: "When EPA, as here, objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to deny a permit within the meaning of [§ 1369(b)(1)(F)]" as an agency action that involves "issuing or denying any permit." *Crown Simpson*, 445 U.S. at 196.

As in *E.I. du Pont*, this Court did not discuss the need for a "practical interpretation" of the Act divorced from the plain meaning of the statutory terms. To the contrary, this Court applied the plain meaning of subsection (F) to the case in a per curiam decision without compromising the statutory text. Neither *E.I. du Pont* nor *Crown Simpson* counsel a rewriting of § 1369(b)(1). The Sixth Circuit was wrong to do so in this case.

The Clean Water Rule does not address any relevant limitations or issue or deny a permit, in a literal or even a practical sense. It identifies jurisdictional waters, not compliance standards. That the jurisdictional boundaries identified in the Rule may be relied on ultimately to determine effluent guidelines or the issuance or denial of a permit does not change the nature of the Rule itself, which is limited to defining "waters of the United States" subject to review in the district courts. This Court should grant the petition.

IV

THIS COURT SHOULD GRANT REVIEW TO EFFECTUATE THE INTENT OF CONGRESS

Assuming Congress acted within its constitutional authority, it is black letter law that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is law and must be given effect." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837,843 n.9 (1984). It is also black letter law that the intention of Congress is best ascertained from the language Congress used to express its intent. "If the intent of Congress is clear, that is the end of the matter . . . ." *Id.* at 842.

The intent of Congress in § 1369(b)(1) is clear, even if the Sixth Circuit refused to follow it. Subsection 1369(b)(1) of the Clean Water Act could not be more clear: Actions of the Environmental Protection Agency are subject to exclusive review in the courts of appeals only when "approving or promulgating any effluent limitation or other limitation" and when "issuing or denying any permit." However one may wish to interpret that language, it cannot be said to cover *all* agency actions. But that is the result if § 1369(b)(1) applies to the Clean Water Rule.

> If this court construes [§ 1369(b)(1)] to be so broad as to cover the facts of this case, that construction brings subsection (F) to its breaking point: a foreseeable consequence of the concurrence's reasoning is that this court would exercise original subject-matter

> jurisdiction over all things related to the Clean Water Act.

In re Department of Defense, 817 F.3d at 284 (Keith, J., dissenting).

That is the result if the Sixth Circuit jurisdictional ruling is allowed to stand. It is not the result Congress intended. To the contrary, the language of § 1369(b)(1) necessarily excludes agency actions that do not involve an effluent limitation (or other limitation) or a permit decision.

The Clean Water Rule does not purport to set any relevant limitation or issue or deny a permit, either general or individual. The government does not and cannot point to any language in the Rule to the contrary. The Rule is confined to defining so-called jurisdictional waters or "waters of the United States," subject to federal regulation. Even a formal, site-specific Jurisdictional Determination, based on the Rule's definition of "waters of the United States," does not constitute the issuance or denial of a permit. Recently, in *U.S. Army Corps of Engineers v. Hawkes Co.*, __ U.S. __, 136 S. Ct. 1807 (2016), this Court authorized judicial review of formal Jurisdictional Determinations directly in the district court, even remanding the case for trial court resolution. If a site-specific Jurisdictional Determination does not invoke § 1369(b)(1), it is hard to fathom how the more general Clean Water Rule could do so.

Agency actions authorized for direct review in a court of appeals under § 1369(b)(1) generally involve discrete, site-specific determinations. To alleviate the burdens of such decisionmaking, Congress sensibly authorized immediate review of targeted agency

actions in the court of appeals. According to District Judge Renfrew, sitting by designation, and cited by this Court in *Crown Simpson*, § 1369(b)(1) signaled a "congressional goal of ensuring prompt resolution of EPA's actions." 445 U.S. at 196. But congress did not express an intent to resolve all agency actions related to the Clean Water Act in the court of appeals. Otherwise it would have said so. *See Harrison v. PPG Industries Inc.*, 446 U.S. 578, 579 (1980) (citing Section 307(b)(1) of the Clean Air Act that provides for direct review in a court of appeals for any "final action" of the EPA under the act.).

Where the agency action does not generally involve a discrete, site-specific determination, Congress left judicial review to the district courts. That approach benefits all parties and the court when the agency action involves a definitional rule of nationwide application, like the Clean Water Rule. In this case, and cases like it, the courts of appeals benefit greatly from a broad spectrum of district court opinions, especially those opinions that address the regional differences of the Rule's application.

The courts' understanding of these differences can affect the ultimate resolution of the agency action. For example, an "ephemeral stream" in the east may flow often with copious amounts of water such that it has a measurable effect on a nearby navigable water; whereas, an "ephemeral stream" in the arid west may be no more than a barely discernible desert channel that only flows once every decade, or more rarely, and has no observable effect on a downstream navigable water hundreds of miles away. Federal regulation of the former may be reasonable, but regulation of the latter would be arbitrary and capricious. And yet, both

are deemed categorical "waters of the United States" under the Clean Water Rule. *See* 80 Fed. Reg. at 37104-37106. Multiple challenges to the Rule in district courts throughout the country are necessary and have been initiated to vet the Rule.

The intent of Congress as expressed in § 1369(b)(1) is clear. It does not cover the Clean Water Rule. This Court should grant the Petition to effectuate congressional intent and allow the currently stalled district court cases to proceed.

CONCLUSION

The Sixth Circuit decision raises an important question of law that requires resolution by this Court. Delay in resolving the question is unnecessary and counterproductive. This Court should grant the Petition to determine subject matter jurisdiction under § 1369(b)(1) of the Clean Water Act.

DATED: October, 2016.

Respectfully submitted,

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